

Records Relating to Visual Depictions of Sexually Explicit Conduct
OMB PRA/ICR Control No.1123-0009

PRA Supporting Statement

This PRA supporting statement relates to the information collection required under 28 CFR Part 75. These regulations require entities to create and retain records demonstrating that persons appearing in visual depictions of actual or simulated sexually explicit conduct are at least 18 years of age. Part 75 was created to implement 18 U.S.C. Section 2257, regarding depictions of actual sexually explicit conduct. The Adam Walsh Child Safety and Protection Act of 2006 amended Section 2257 in several ways and created 18 U.S.C. Section 2257A, regarding depictions of simulated sexually explicit conduct and the lascivious exhibition of the genitals. The collection was originally issued under two different control numbers because two different rulemakings were instituted to implement the amendments to Section 2257 and the enactment of Section 2257A. However, the proposed rulemakings were merged into one final rule, as they both amended Part 75, and, subsequently, this PRA statement was merged as well.

1. 28 CFR Part 75 requires recordkeeping, labeling, and inspection requirements for visual depictions of actual or simulated sexually explicit conduct. Part 75 also provides for a certification regime for the exemption of producers, in certain circumstances, from the requirements for visual depictions of simulated sexually explicit conduct and from the requirements for producers of visual depictions of actual sexually explicit conduct constituting lascivious exhibition. These requirements are intended to prevent the exploitation of children through the production of visual depictions of sexually explicit activity that involve them.

2. The Department may use the records required by the regulations for investigating and prosecuting possible criminal offenses. Unless inspected, and seized as evidence of a crime, the information remains in the possession of the recordkeeper. If seized as evidence of a crime, the information will be treated in a similar fashion, and under similar restraints, as evidence otherwise held by the Department of Justice (hereinafter “the Department”) for the prosecution of criminal offenses.

3. Records may be kept in paper or electronic form as the producer may desire, so long as the records meet the requirements of the regulation. One commenter to the notice of information collection renewal suggested two changes to the collection involving electronic means that would potentially simplify the procedures. First, the commenter suggested, DOJ could create a system of voluntary registration for producers of sexually explicit conduct. Producers could then mark depictions with a registration number that could easily identify the producer and where records are located. According to the commenter, this would reduce the burden of marking each depiction with the name and located of the producer. Second, the commenter stated that DOJ could create a system for registration of depictions that would include marking depictions and then electronically providing DOJ with the records associated with the depiction. According to the commenter, this would eliminate the need for

physical inspections of records. DOJ acknowledges that these ideas have the potential for reducing the burden for compliance for Part 75 and will examine their feasibility, with the intent to reach a decision on whether to accept this suggestion within one year of publication of this statement.

4. This collection is not duplicative with any other Federal requirement. In the absence of the paperwork requirements in this ICR, covered entities would likely not retain such records unless they did so voluntarily or were required to do so by State or local law.

5. There are no special accommodations in Part 75 for small businesses.

6. Part 75's recordkeeping, labeling, and inspection requirements are designed to provide assurances that children are not involved in the production of depictions of actual or simulated sexually explicit conduct. Without requiring the maintenance of records for inspection that actually establish the identity and age of the performers, it is not possible to acquire sufficient assurances that children are not involved in the production of depictions of such conduct.

7. Evidence of criminal conduct could cause an inspection to occur more frequently than quarterly. No other factor is relevant.

8. DOJ published notices of information collection renewal on January 20, 2012 and March 26, 2012. See 77 FR 3003 and, "Agency Information Collection Activities: Information Collection Renewal; Comments Requested: Inspection of Records Relating to Visual Depictions of Simulated Sexually Explicit Performances," 77 Fed. Reg. 17501 (Mar. 26, 2012). Two comments were received in response to the notices, one from an industry association representing producers of depictions of sexually explicit conduct and another from an attorney who represents such producers. (The collection notice was labeled as covering only records of depictions of simulated sexually explicit conduct and the text of the notice appeared to address only the record-keeping requirements for producers of such material. It was intended to cover all collections under Part 75, in line with the merged control number. However, notwithstanding the error, the commenters addressed all collections.)

As an initial matter, DOJ notes that most of the comments from the two commenters addressed issues that are outside the scope of the PRA notice, such as the Constitutionality and scope of application of the statute, which are matters currently in litigations, and suggestions for substantive changes to the regulation, such as easing liability for mistakes by third-party custodians of records. Those are not at issue in this renewal of the information collection. Further, one of the commenters requested a public hearing on the information collection. DOJ does not believe that such a hearing is necessary. DOJ requested comments on the paperwork burden in the proposed rules, in the merged final rule, and in the notice of renewal of information collection. Few comments were received, and none provided any substantive measure of the burden. The two commenters on the notices of collection renewal did not provide figures or other information persuading the Department to amend its burden estimate. DOJ believes that

a public hearing would therefore not produce any more exact delineation of the burden of the regulation than is already available.

As to the comments themselves, as noted above in the response to question 3, one commenter made two points that DOJ will examine. The other commenter also made a substantive point that the Department will address. Namely, the commenter suggested that DOJ develop standard forms for the collection of information from producers subject to Part 75, rather than requiring self-generated records systems. DOJ will examine the feasibility of this suggestion, with the intent to reach a decision on whether to accept this suggestion within one year of publication of this statement.

Other comments that specifically addressed the burden and cost did not provide any information that are likely to make DOJ's estimates any more precise on these points.

For example, one commenter stated that he did not believe DOJ's estimate that 3,000,000 depictions of sexually explicit conduct were produced each year and that the true figure could be "100 to 1000 or perhaps...10,000 times" greater. This commenter also stated that a Google search for the term, "Section 2257 notice" yielded approximately 24 million hits. Setting aside the fact that a simple Google search would include *any* mention of Section 2257 and its requirements, in addition to depictions bearing such a notice themselves, it is worth noting that such hits are less than 10 times DOJ's estimate, not 100, 1000, or 10,000.

It should be noted that one commenter argued that DOJ, as a large government law enforcement agency, should be able to investigate and determine the true size of the industry to be regulated. However, as noted by the *Los Angeles Times*, "Reliable revenue and employment figures for the adult industry don't exist, since no analysts or economists track it." Ben Fritz, "Tough Times for the Porn Industry," *Los Angeles Times*, Aug. 10, 2009. Having said that, a subsequent report in the same newspaper stated that only 6000 adult films are produced each year, the majority in Los Angeles, by approximately 30 companies, and that production of pornography accounts for only 5 percent of film permits issued in Los Angeles. See, Richard Verrier, "Porn Studio is Among the 10 Busiest Sites for On-Location Filming in L.A.," *Los Angeles Times*, Feb. 9, 2011. (However, DOJ recognizes that, according to these news reports, these major producers are facing competition from smaller companies devoted to web-only depictions that are often offered for free.)

DOJ also recognizes that, as the commenters noted, the previous estimate was based on figures that are now several years old. However, in the absence of any more specific figures, DOJ will retain its previous estimate of the numbers of depictions.

9. No payment or gift is made to the respondent.

10. The Department makes no assurances of confidentiality outside the criminal investigative and prosecutive process.

11. The recordkeeping requires only documentation of identity and specific products that include depictions of sexually explicit conduct. The requirements do not include any of the items identified in the instructions as sensitive.

12. The Department has no way of estimating with precision the annual recordkeeping hours burden because of the multitude of variables within the control of producers. As described above, there are no statistics available on the number of depictions of sexually explicit conduct created each year. DOJ will therefore retain the previous estimate of 230,000 hours per year.

For actual sexually explicit conduct, 2,000,000 depictions x .1 hours/depiction = 200,000 hours.

For simulated sexually explicit conduct, 300,000 non-exempt depictions x .1 hours/depiction = 30,000 hours.

Total for actual and simulated sexually explicit conduct = 230,000 burden hours.

13. No reliable figures are available to estimate with precision the total cost burden of the information collection requirement of Part 75. Some figures regarding costs are available from public sources. According to an article in Adult Video News, the trade publication for the pornography industry, software is available for \$3,000 to assist producers in compliance. See, Mark Kernes, "Call to Action: Join FSC in the Fight Against 2257," AVN.com, July 4, 2012. In addition, according to Adult Video News, third-party custodians charge "upwards of" \$150 per title. *Id.* (However, the report also alleges that such options are not available to many producers who are subject to the regulation.) DOJ was independently able to confirm availability of commercial 2257 compliance software. One software package was advertised at \$795 initial set-up and \$468 per year for maintenance for a small business and \$2995 set-up and \$165 per month (before additional users or yearly discount) for medium and large enterprises. See, <http://www.zei2257.com/productoverview-pricing.html> A discount for FSC members is also available. It is not clear if this product is the same referenced in the AVN .com article, however. Another firm offers third-party custodial services in various packages ranging from a base rate of \$99 set-up and \$12.95 monthly cost up to \$99 set-up and \$99.995 monthly cost, before discounts. See, <http://www.informationlaw.com/ProductsServices.htm>. These figures may not be representative, and are not the result of a comprehensive market survey. However, they do provide some insight into commercially available solutions for entities required to maintain records in according with Part 75.

14. The federal government only incurs costs related to the collection in two circumstances. First, it incurs costs when it conducts an inspection of the records. There is currently no inspection program. Second, it incurs some costs in the receipt, review, and filing of certifications submitted to the Attorney General under Part 75.9. Those costs are de minimus, however.

15. Estimates of the number of burden hours and cost of compliance as described in paragraphs 12 and 13 have not changed.

16. This information will not be published.

17. There is no form associated with this recordkeeping requirement for this information collection.

18. There are no exceptions to the Paperwork Reduction Act Certification for this collection.